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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re Kassandra M. et al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. DANIEL S., Defendant and Appellant.	D056602 (Super. Ct. No. J510949F-G)

APPEAL from findings and orders of the Superior Court of San Diego County, Laura J. Birkmeyer, Judge. Affirmed.

Daniel S. appeals findings and orders terminating his parental rights under Welfare and Institutions Code[1] section 366.26. He also appeals an order denying his motion for a continuance under section 352. We affirm.

1 Further statutory references are to the Welfare and Institutions Code.

INTRODUCTION

Daniel contends the trial court's failure to ensure his presence or his meaningful participation at the section 366.26 hearing violated his federal and state due process rights. He further argues the court violated his right under Penal Code section 2625 to be present at the hearing to terminate his parental rights. (§ 366.26.)

Daniel also contends the trial court abused its discretion when it denied his request to continue the section 366.26 hearing until the completion of an interstate home study on the children's paternal relative. He challenges the court's findings Kassandra M. and Junior S. (Junior) were likely to be adopted within a

reasonable time, and the beneficial parent-child relationship and sibling relationship exceptions to termination of parental rights did not apply.

FACTUAL AND PROCEDURAL BACKGROUND

Daniel is the father of Kassandra, now three years old, and Junior, now age 20 months (together, the children). In March 2009 the San Diego County Health and Human Services Agency removed the children from the care of their mother, Rosa M.[2] The children were living with their mother in what the social worker described as "horrendous" conditions. The home did not have running water. Sewage from a communal bathroom flowed on both sides of the home. Rosa admitted to using cocaine at least twice weekly. Kassandra and Junior tested positive for cocaine. Investigators found razor blades, broken pipes and marijuana in an area of the home that was accessible to the children.

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2 Rosa does not appeal.

The Agency located Daniel in federal custody in San Diego. He was serving a term of 33 months for transporting illegal aliens. At the time of the jurisdiction hearing, Daniel had served five months of his sentence. He was eligible for a one-year reduction in his sentence if he met certain conditions, including promptly completing a substance abuse program. Daniel said he was the children's primary caregiver when he was not incarcerated. Daniel's current incarceration started approximately mid-February 2009. He was previously incarcerated until shortly after Christmas 2008,[3] when Junior was approximately one month old.

When detained, two-year-old Kassandra did not speak and was not able to walk even with assistance. She was assessed to have global developmental delays in fine motor, gross motor, language, personal and social skills. The Agency scheduled a comprehensive assessment for Kassandra at Rady Children's Hospital. There were no concerns about Junior's development.

At a detention hearing on April 14, 2009, the court appointed counsel for Daniel and directed counsel to file a writ to have Daniel produced from federal custody for the next hearing. The court issued a "Writ of Habeas Corpus Ad Prosequendum and Order for Temporary Custody of Prisoner" to the San Diego County Sheriff and the United States Marshal's Service.

Daniel attended a settlement conference hearing on June 4, 2009. At that hearing, the trial court ordered the Agency to consider a paternal relative in New York for

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[3] The record does not indicate the length of time Daniel was incarcerated before his release in December 2008. However, it was sufficient time to allow Daniel to complete a substance abuse treatment program.

placement. Daniel contested jurisdiction. However, before the date of the jurisdiction hearing, Daniel was transferred to an out-of-state federal prison and did not attend the jurisdiction hearing or any other subsequent hearing in the children's dependency proceedings.

In July 2009 the children were adjudicated dependents of the juvenile court. The Agency opposed family reunification services because Daniel was to be incarcerated beyond dependency time limits for children under age three, and Rosa had a longstanding substance abuse problem that had resulted in termination of parental rights to five of her six other children. The trial court bypassed reunification services and set a hearing to select and implement a permanency plan for the children under section 366.26.

On October 8, 2009, the adoptions social worker requested a certified copy of the June 4 court order to initiate an Interstate Compact for the Placement of Children (ICPC)[4] with New York.

The section 366.26 hearing was held on January 5, 2010. The court denied Daniel's request to continue the hearing until the New York social services agency completed the ICPC study of the paternal relative's home. The court admitted the Agency's detention, jurisdiction and disposition, and section 366.26 reports and addendum reports in evidence, and accepted stipulations from the social worker and Rosa.

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4 The ICPC governs conditions for out-of-state "placement in foster care or as a preliminary to a possible adoption." (*In re John M.* (2006) 141 Cal.App.4th 1564, 1573 quoting Fam. Code, § 7901, art. 3, subds. (a), (b).) The purpose of the ICPC is to facilitate cooperation between states in the placement and supervision of dependent children. (*Tara S. v. Superior Court* (1993) 13 Cal.App.4th 1834, 1837.)

The social worker believed the children were adoptable. They were happy, responsive children in good general health. Kassandra was receiving services through the Regional Center Early Start Program (Regional Center). She understood basic words and commands but was not yet talking. The children's foster care parents (caregivers) and the paternal relative were willing to adopt the children. In addition, there were 51 approved adoptive families that were interested in adopting a sibling group of the children's ages, genders, health and development.

The parties stipulated to the social worker's representation the New York social services agency had not yet evaluated the paternal relative's home and the ICPC home study was pending. The Agency represented it would continue to wait for the results of the home study and if favorable, the Agency would consider the relative's home for placement. The Agency stated it intended to place the children together in an adoptive placement, whether with the caregivers or with the relative.

The court determined the children were adoptable and ordered the Agency to limit its consideration of adoptive families to those willing to adopt the children together. The court found that termination of parental rights would not be detrimental to the children under the exceptions described in section 366.26, subdivision (c)(1), and terminated parental rights.

DISCUSSION

I

DUE PROCESS AND RIGHT OF PHYSICAL PRESENCE

Daniel contends the court's failure to ensure his presence at the section 366.26 hearing, or to offer him an alternative means to meaningfully participate in the hearing, violated his fundamental due process rights under the federal and state constitutions. He argues when a prisoner cannot be present at a hearing at which his or her fundamental interests are at risk, the court is obligated on its own motion to offer or provide alternative means to the prisoner to participate in the hearing. Daniel also contends the court violated his statutory right under Penal Code section 2625 to be present at the hearing to terminate his parental rights.

Daniel states his testimony was required to challenge the Agency's efforts to secure the paternal relative's ICPC home study, and to show the children were not adoptable and that he had a beneficial parent-child relationship with his children. Daniel posits his testimony concerning his relationship with his children was essential because there was no other evidence concerning the nature of those relationships. He contends the error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

There is no dispute that prisoners have a fundamental right of access to the courts. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 601 (*Jesusa V.*), citing *Payne v. Superior Court* (1976) 17 Cal.3d 908, 914 (*Payne*); see also *United States v. Georgia* (2006) 546 U.S. 151, 162; *Lewis v. Casey* (1996) 518 U.S. 343, 351; *Bounds v. Smith* (1977) 430 U.S.

817, 821-822.) Prisoners do not necessarily have a constitutional right to be *personally present* at every type of hearing. (*Jesusa V.*, *supra*, at p. 601.) The constitutional touchstone is "meaningful access" to the courts. (*Bounds v. Smith*, *supra*, at p. 823.)

While due process is a flexible concept and cannot be precisely defined, there is no doubt due process guarantees apply to dependency proceedings. (*Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 24; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 222-223 (*Dakota H.*).) In dependency proceedings, generally, due process is satisfied when the prisoner-parent, who is involuntarily absent from the proceedings, receives meaningful access to the court through appointed counsel *and* is not denied the opportunity to present evidence in some form and cross-examine the witnesses. (*In re Jesusa V.*, *supra*, 32 Cal.4th at pp. 601-602, (italics added), citing *Payne*, *supra*, 17 Cal.3d at p. 914; *In re Axsana S.* (2000) 78 Cal.App.4th 262, 269-270; see *Cook v. Boyd* (E.D.Pa. 1995) 881 F.Supp. 171, 175; see generally *Santosky v. Kramer* (1982) 455 U.S. 745, 752-754.)

The California Supreme Court has stated that while the appointment of counsel for a prisoner involved in a civil action would "probably suffice in most cases, in other instances it may also be desirable for the prisoner to testify on his own behalf." (*Payne*, *supra*, 17 Cal.3d at p. 924.) Thus when the court determines *on motion* the testimony of a prisoner-defendant is needed to protect the parties' due process rights, the court may attempt to arrange the presence of the prisoner. (*Ibid.*, (italics added); see Pen. Code, § 2625.) If the prisoner cannot be present in court, the court may order a continuance or employ other alternatives, such as recording the prisoner's testimony, allowing telephonic

testimony, or by accepting a declaration or implementing other innovative, imaginative procedures. (*Payne, supra*, at p. 925; *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1483-1484, citing Code Civ. Proc., § 128.) These safeguards apply as well to a prisoner-parent whose fundamental interests in the care and custody of his children may be altered or extinguished in court proceedings. (*Jesusa V.*, *supra*, 32 Cal.4th at pp. 601-602; see *Bounds v. Smith*, *supra*, 430 U.S. at p. 823.)

The manner in which the court safeguards a prisoner's due process rights is left to the sound discretion of the court. (*Payne, supra*, 17 Cal.3d at p. 924; *Jesusa V., supra*, 32 Cal.4th at p. 601.) "[W]hen a prisoner is threatened with a judicially sanctioned deprivation of [a fundamental interest], due process and equal protection require a meaningful opportunity to be heard. How that is to be achieved is to be determined by the exercise of discretion by the trial court." (*Payne, supra*, at p. 927.)

In addition to a prisoner's constitutional right of access to the courts, California provides statutory protections to prisoners in custody in a state prison or other designated state institution in proceedings affecting certain parental or marital rights, including specifically the termination of parental rights under section 366.26. (Pen. Code, § 2625, subds. (a), (b).) Where the prisoner or his or her attorney indicates the prisoner desires to be present at the proceeding, the court is required to issue an order for the temporary removal of the prisoner from the institution and the prisoner's production before the court. (Pen. Code, § 2625, subd. (d).) The court is prohibited from holding a hearing to terminate the parental rights of a prisoner without the physical presence of the prisoner

and the prisoner's attorney, unless the court has received a knowing waiver of the prisoner's right of physical presence. (*Ibid.*; *Jesusa V., supra*, 32 Cal.4th at pp. 622-624.)

We are not persuaded by Daniel's argument the court violated his statutory right to be present at the section 366.26 hearing. Daniel is in federal custody. By its plain terms, Penal Code section 2625 applies only to prisoners in the custody of the state of California. (Pen. Code, § 2625, subd. (a).) There is no statutory equivalent in California establishing a procedure to facilitate the attendance of out-of-state or federal prisoners.[5] (*In re Maria S.* (1997) 60 Cal.App.4th 1309, 1312.) The California juvenile court does not have jurisdiction to order the warden of a prison in another state to transport a prisoner to California. (*In re Axsana S.*, *supra*, 78 Cal.App.4th at p. 270; *In re Gary U.* (1982) 136 Cal.App.3d 494, 499.) Thus David is not entitled to the statutory protections afforded a prisoner-parent under Penal Code section 2625. Further, even if Penal Code section 2625 applied to prisoners in federal custody, which it does not, the record shows Daniel or his attorney did not indicate Daniel desired to be present at the section 366.26 hearing, as required under Penal Code section 2625, subdivision (d).

The record further shows that Daniel did not inform the trial court he required an alternative means to meaningfully participate in the section 366.26 hearing. On appeal, Daniel suggests the request for meaningful access was inherent in his motion for a continuance. The record does not support Daniel's argument. As discussed in Part II,

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5 A state court may issue a writ of habeas corpus testificandum or prosequendum to produce a federal prisoner to testify or appear in a state court proceeding. The United States Marshal states it is not required to honor a request for a federal prisoner pursuant to a state or local writ. (<http://www.usmarshals.gov/prisoner/writs.htm> [as of Jul. 20, 2010].)

post, Daniel specifically asked the court to continue the section 366.26 hearing until the ICPC home study was completed. He did not request a continuance for the purpose of submitting testimony or to ensure his presence, either in person or through alternative means. Daniel did not argue at trial he was denied meaningful access to the court in derogation of his due process rights. We conclude Daniel has forfeited this argument on appeal. (*Dakota H.*, *supra*, 132 Cal.App.4th at pp. 221-222.)

Daniel next argues the court is obligated on its own motion to offer or provide alternative means to participate to a prisoner who cannot personally attend a section 366.26 hearing. We do not agree. The parent, in consultation with his or her attorney, decides whether to exercise his or her rights to testify, present evidence and call witnesses. (Cal. Rules of Court,[6] rule 5.534(k).) While judges have a constitutional duty to uphold the due process clause, the burden is on the prisoner to show the prisoner's presence, or an alternative means of participating in the hearing, is necessary to protect a party's due process rights. (*Payne*, *supra*, 17 Cal.3d at p. 924; cf. *People v. Medina* (1995) 11 Cal.4th 694, 744.) The court had no sua sponte duty to guarantee Daniel's presence at the hearing, or to offer or provide an alternative means to allow Daniel to participate in the hearing, in the absence of a motion and a showing the testimony was necessary to protect his or another party's due process rights. (*Payne*, *supra*, at p. 924.)

The record shows Daniel was not deprived of his due process rights. (See, generally, *Mathews v. Eldridge* (1976) 424 U.S. 319, 334-336; *In re Malinda S.* (1990) 51 Cal.3d 368, 383; *In re Jackson* (1987) 43 Cal.3d 501, 510-511.) Daniel was

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6 Further rule references are to the California Rules of Court.

represented by counsel throughout the dependency proceedings. (*Jesusa V.*, *supra*, 32 Cal.4th at pp. 601-602.) Unlike Rosa, who was in federal custody in northern California and appeared at the section 366.26 hearing, Daniel did not ask to be present at the hearing or file a writ to secure his presence. There is nothing in the record to suggest he was prevented from doing so. Daniel was not denied an opportunity to present evidence in some form on his own behalf. His attorney was not prevented from presenting evidence, calling witnesses or cross-examining the social worker or other witness. (*Jesusa V.*, *supra*, at pp. 601-602.) That Daniel chose not to exercise those rights does not mean he was denied his due process rights by the state.

Further, the record shows constitutional error, if any, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Daniel's testimony would not have altered the trial court's ruling on the motion for a continuance, the adoptability findings or the determination the beneficial parent-child relationship did not apply. Daniel's testimony was not required to show why the social worker did not effectively initiate the ICPC home study until October 8, 2009. The June 4, 2009 order directing the Agency to evaluate the paternal relative was clear, and did not require Daniel's testimony to establish the date he first informed the Agency of a possible relative placement for the children. The social worker had facts pertaining to the Agency's ICPC processes, not Daniel.

With respect to Daniel's claim the children were not adoptable, the record clearly shows the children's caregivers and the paternal relative wanted to adopt the children (see Part III, *post*.). At minimum, Daniel's testimony would not have affected the finding the

children were specifically adoptable. Further, Daniel cannot show his testimony would have changed the outcome of the court's determination Daniel did not have a beneficial parent-child relationship with the children (see Part IV, *post*). Even if the court had given full credence to Daniel's assertion he was the children's primary caregiver when he was not incarcerated, Daniel would not have been able to show the strength and quality of the natural parent-child relationship in a tenuous placement would outweigh the security and stability of adoption for Kassandra and Junior. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*).)

Thus error, if any, in not securing Daniel's testimony through alternative means is harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) With respect to the alleged statutory violation under Penal Code section 2625, for the same reasons set forth above, it is not reasonably probable a result more favorable to Daniel would have been reached had he been present at the section 366.26 hearing. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

MOTION FOR CONTINUANCE UNTIL COMPLETION OF ICPC

Daniel argues the trial court abused its discretion by denying his request to continue the section 366.26 hearing to permit him to litigate the children's placement with their paternal relative. He states the four-month delay in initiating the ICPC was attributable to the Agency. Daniel contends the denial of his request for a continuance contravened statutory preferences for relative placement, deprived him of his due process right to be heard on the issue of placement and affected his opportunity to retain his

parental rights. Daniel further argues in view of the Legislative preference for relative placement and the children's stability in the caregivers' home, a continuance was not contrary to the children's interests.

Section 352 provides at the request of counsel for the parent, guardian, minor or agency, the court may continue any dependency hearing beyond its usual time limits on a showing of good cause, provided no continuance shall be granted that is contrary to the child's interests. The continuance may not be for a longer period of time than shown to be necessary by the evidence presented at the hearing on the motion for the continuance. (*Ibid.*)

We review the denial of a motion for a continuance for abuse of discretion. (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 585.) Continuances of section 366.26 hearings are discouraged. (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810-811.)

Daniel argues the four-month delay in initiating the ICPC was attributable to the Agency. The Agency points out that this issue was not raised at trial. Daniel did not call the social worker to testify about the Agency's procedures. The trial court did not consider whether any delay by the Agency in initiating the ICPC home study was unwarranted and merited a continuance, if not contrary to the children's best interests. (§ 352.) While we are concerned by any apparent delay by the Agency in complying with a court order to evaluate a relative's home for placement, on this record we must conclude that Daniel has forfeited this specific argument on appeal. (*Dakota H.*, *supra*, 132 Cal.App.4th at pp. 221-222.)

Daniel stated a continuance would allow him the opportunity to litigate the issue of the children's placement prior to the section 366.26 hearing. In order to litigate placement, the home study would have to be favorable and the Agency would have to oppose the children's placement with the relative. There was no preliminary information about the relative in the record and no indication whether the relative's home was likely to be approved. Thus the purpose of the continuance was dependent on speculative factors that might not occur and, in any event, would delay the selection of the children's permanency plan. The trial court reasonably exercised its discretion when it determined Daniel did not show good cause for the continuance.

Moreover Daniel's request for a continuance was not for a time certain, as required by section 352. Rather, he asked the court to continue the hearing until the Agency received the results of the New York home study. The Agency, once it initiated the ICPC, had no control over New York social services procedures, and did not know how much longer the process would take. To fulfill the purpose of the continuance, it would have to be open-ended, which is statutorily disfavored. (*Ibid.*)

The children's interests favored permanency. (*In re Marilyn H.* (1993) 5 Cal.4th 395, 209; *In re A.M.* (2008) 164 Cal.App.4th 914, 925.) Further, an oral motion for a continuance the day of the section 366.26 hearing is disfavored. (*In re Ninfa S.*, *supra*, 62 Cal.App.4th at pp. 810-811.) A continuance on the grounds sought by Daniel would delay the proceedings for speculative reasons, which is contrary to the children's best interests. (§ 352.) We conclude that the court reasonably exercised its discretion when it denied Daniel's motion.

III

ADOPTABILITY FINDINGS

Daniel contends substantial evidence does not support the findings Kassandra and Junior would likely be adopted within a reasonable time if parental rights were terminated (adoptability findings). (§ 366.26, subd. (c)(1).) Daniel points out Kassandra's comprehensive assessment at Rady Children's Hospital was not included in the record. He argues Kassandra's global delays might indicate she will have more serious problems in the future. Daniel acknowledges a summary of the assessment was included in the court report but argues the summary is too vague to resolve serious questions about Kassandra's adoptability. Daniel also contends the evidence does not support the finding Kassandra is generally adoptable because the placement coordinator did not screen for potential adoptive families willing to adopt a child with Kassandra's level of developmental disabilities.

Daniel implicitly acknowledges substantial evidence supports the finding Junior is adoptable. He argues Junior's adoptability finding is not supported by substantial evidence because Junior is a member of a sibling pair and his sibling is not adoptable.

A finding of adoptability requires "clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time." (*In re Zeth S.* (2003) 31 Cal.4th 396, 406 (*Zeth S.*); § 366.26, subd. (c)(1).) The question of adoptability usually focuses on whether the child's age, physical condition and emotional health make it difficult to find a person willing to adopt that child. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) The possibility a child may have future problems does not mean the child is not

adoptable. (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223-225; see *In re Helen W.* (2007) 150 Cal.App.4th 71, 79.)

On review, we determine whether the record contains substantial evidence from which the court could find clear and convincing evidence the child was likely to be adopted within a reasonable time. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1231-1232.)

The record shows the Agency assessed Kassandra and Junior as adoptable children. The children were in good general health and interacted well with others. The social worker described them as "bubbly children who enjoy[ed] family and outdoor activities." The children's paternal relative was "eagerly committed" to adopting the children. If the relative was unable to adopt the children, the caregivers were willing to provide them with a permanent adoptive home. In addition to the two identified prospective adoptive families, the Agency's placement coordinator, screening for age, gender, health and development, identified 22 possible approved adoptive families in San Diego County, and 51 out-of-county approved adoptive families, that were willing to adopt a sibling group like Kassandra and Junior.

The summary of Kassandra's developmental screening at Rady Children's Hospital stated she had "low average cognitive skills," and delays in speech, language, and fine and gross motor skills. Kassandra understood basic words and commands but was for the most part nonverbal. The summary did not specifically describe the extent of those delays. Kassandra was receiving developmental services twice weekly through the Regional Center. The social worker reported Kassandra was learning more words, colors and numbers.

The record permits the reasonable inference Kassandra's global delays could be ameliorated by appropriate educational services. With services provided by the Regional Center, Kassandra was making progress. She did not need medical, psychological or behavioral interventions. Contrary to Daniel's argument, the placement coordinator did not screen the children for adoptive placement only on the bases of age, gender and health. The record clearly states the children were also screened according to their development. We infer the placement coordinator screened Kassandra for adoption based on an accurate general description of her low average cognitive skills, global delays and amenability to special education services.

Even were we to accept Daniel's argument the children were not generally adoptable, which we do not, the record clearly shows there are two identified prospective adoptive families that are willing to adopt the children. By the time of the section 366.26 hearing, the children had lived with one of those families for more than nine months. The record permits the reasonable inference the children's caregivers were aware of Kassandra's developmental status and her needs, as well as Junior's needs. Further, the record shows the paternal relative was eager to adopt the children. It is not unreasonable to infer the children's natural family would accept and love the children no matter their challenges. There is substantial evidence to support the trial court's findings the children were likely to be adopted within a reasonable time. (§ 366.26, subd. (c)(1).)

IV

EXCEPTIONS TO TERMINATION OF PARENTAL RIGHTS

Daniel argues termination of parental rights would be detrimental to the children because they had a beneficial parent-child relationship with him and because adoption would substantially interfere with the children's significant sibling relationship with each other. (§ 366.26, subd. (c)(1)(B)(i), (v).)

At a section 366.26 hearing, the trial court may select one of three alternative permanency plans: adoption, guardianship, or long-term foster care. (*In re Taya C.* (1991) 2 Cal.App.4th 1, 7.) Unless there is a relative caregiver who is unwilling or unable to adopt the child, there is a strong preference for adoption over alternative plans. (§ 366.26, subd. (c)(1)(A); *San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 808-809.) If the court determines the child is likely to be adopted, the burden shifts to the parent to show termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1)(B).

We determine whether there is substantial evidence to support the court's ruling by reviewing the evidence most favorably to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court's ruling. (*Autumn H., supra,* 27 Cal.App.4th at p. 576; *In re S.B.* (2008) 164 Cal.App.4th 289, 298.)

1. Beneficial Parent-Child Relationship Exception

An exception to termination of parental rights exists when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from

continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) "Benefit from continuing the relationship" means "the [parent-child] relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The exception does not require proof the child has a "primary attachment" to a parent or the parent has maintained day-to-day contact with the child. (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 300; *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534-1538; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

Daniel argues Kassandra has a beneficial parent-child relationship with him because he was her primary caregiver when he was not incarcerated. He acknowledges he lived for only a short time with Junior, implicitly acknowledging they did not have an established parent-child relationship. In view of his incarceration, Daniel contends the lack of visitation is not a bar to establishing the beneficial parent-child relationship exception to termination of parental rights. (*In re Brandon C.*, *supra*, 71 Cal.App.4th at pp. 1537-1538.) He argues the court erred when it based its assessment of the parent-child relationship on the quality of care the children received while they were in parental custody. Daniel maintains if this were the case, no parent in a dependency proceeding would be able to prove the exception because, to varying degrees, all dependent children have been abused or neglected while in their parent's care.

The record shows the trial court appropriately considered the totality of the children's circumstances when it determined whether the beneficial parent-child relationship exception applied. The court observed that the children had been

significantly neglected while in their parents' care and drew the reasonable inference the children had not benefitted from the parental relationship at that time. The court stated neither parent had provided for the children's needs during the children's dependencies. The court found that the children were thriving with appropriate care, shelter, clothing and affection, and would significantly benefit from adoption.

Substantial evidence supports the court's findings. The parents' lack of attention to the children's needs for a safe environment while the children were in parental custody permits the reasonable inference Daniel and Rosa were not protective of the children and did not understand their needs. While Daniel stated he was concerned about Kassandra's delays, he acknowledged he did not seek services for her. He used cocaine with Rosa shortly before the children were detained in protective custody. He was incarcerated when Junior was born. Daniel took the initiative to contact the social worker and foster parent when he heard the children had been removed from Rosa's care; however, he was not able to visit the children during the dependency proceedings. The record shows Daniel was incarcerated for a period of time before his current incarceration as well, further limiting his contact with Kassandra. The record supports the findings Daniel was in and out of the children's lives due to his history of repeated criminal activity and incarceration. The social worker did not believe the children were strongly attached to Daniel because of their ages and the fact he had been absent from their lives for almost a year.

Further, the record shows the lack of an ongoing relationship with Daniel and Rosa had not caused the children any harm. The social worker stated the children were

happy being part of the caregivers' family. Their adoption, preferably by their paternal relative or caregivers, would provide them with stability and permanency in a consistent, safe and caring environment. The social worker believed the benefits of adoption and the children's needs for permanency outweighed any detriment to the children from the loss of their relationships with their parents.

The trial court reasonably found that the parent-child relationship did not promote the children's well-being to such a degree as to outweigh the well-being they would gain by adoption. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) There is substantial evidence to support the finding that the beneficial parent-child exception did not apply.

2. The Sibling Relationship Exception

The sibling relationship exception applies when the parent shows, by a preponderance of the evidence, termination of parental rights would substantially interfere with a child's sibling relationship. (§ 366.26, subd. (c)(1)(B)(v).) To determine whether the exception applies, the court considers "whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v); see *In re Celine R.* (2003) 31 Cal.4th 45, 54, *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1007.)

Daniel does not show on appeal the trial court erred when it determined the sibling relationship exception did not apply. The court had directed the Agency to place the children together in a prospective adoptive home. The Agency represented to the court

that it did not plan to separate the children. The only reasonable inference is that adoption would not substantially interfere with the sibling relationship, and therefore the exception did not apply. (§ 366.26, subd. (c)(1)(v).)

Moreover, in the unlikely event the Agency could not locate an adoptive home willing to take both children, the children's ages and needs support the reasonable inference their long-term emotional interests would be best served by adoption. The application of the sibling relationship exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 950.) We conclude the court did not err when it found the children were adoptable and no exceptions applied to preclude termination of parental rights. (§ 366.26, subd. (c)(1).)

DISPOSITION

The findings and orders are affirmed.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

MCDONALD, J.